



**The Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: Logistical Support, Inc.

File: B-230190, B-230192

Date: April 19, 1988

DIGEST

1. Department of Defense (DOD) set-aside program for small disadvantaged businesses which does not contain an exclusion for procurements which have been previously set aside for small businesses is a legally permissible implementation of section 1207 of DOD Authorization Act, which directs that five percent of contract funds are to be made available for contracts with small disadvantaged businesses.

2. It is not legally objectionable for solicitations issued after June 1, 1987, but prior to March 21, 1988, to be set aside for small disadvantaged business (SDB) concerns even though the product or service in question has been previously acquired successfully under a small business set-aside. Such solicitations are consistent with the interim rule implementing the Department of Defense SDB set-aside program in effect at the time those solicitations were issued; a subsequent interim rule, which does provide an exclusion from the SDB set-aside program for those procurements which have been previously set aside for small businesses, applies only to solicitations issued on or after March 21, 1988.

DECISION

Logistical Support, Inc. protests the terms of two solicitations, one of which was issued by the Air Force and one by the Army.^{1/} Both solicitations were issued as 100-percent

^{1/}Although the protests involve solicitations issued by different agencies, we have considered them in a single decision since they raise essentially the same issues. The protest and solicitation numbers are as follows: B-230190, request for proposals (RFP) No. F05604-88-R-0026, issued by the Air Force; and B-230192, invitation for bids (IFB) No.

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small disadvantaged business (SDB) set-asides. The protester, a nondisadvantaged small business, argues that the solicitations should be amended or canceled and the requirements resolicited to allow competition by all small businesses since these same requirements have been previously acquired successfully under small business set-aside contracts.

We deny the protests.

Both solicitations were issued as total set-asides for small disadvantaged business (SDB's) pursuant to Defense Federal Acquisition Regulation Supplement (DFARS) §§ 219.501-70 and 219.502-72, 52 Fed. Reg. 16,263, 16,266 (1987). This special category of set-aside was authorized by section 1207 of the National Defense Authorization Act for Fiscal Year 1987, Pub. L. No. 99-661, 100 Stat. 3816 (1986), which establishes a Department of Defense (DOD) goal of awards to SDBs of five percent of the dollar value of total contracts to be awarded by DOD for fiscal years 1987, 1988, and 1989. Section 1207(e) directs the Secretary of Defense to "exercise his utmost authority, resourcefulness and diligence" to attain the five percent goal and permits the use of less than full and open competitive procedures to do so, provided that contract prices do not exceed fair market value by more than ten percent.

To implement this statutory mandate, DOD's Defense Acquisition Regulatory (DAR) Council drafted an interim rule which amended various DFARS provisions and established the procedures for conducting SDB procurements. The interim rule was published on May 4, 1987, and was made effective for all DOD solicitations issued on or after June 1. 52 Fed. Reg. 16,263. Both solicitations at issue here were issued after June 1, 1987 but before March 21, 1988.

After issuing the interim rule and reviewing public comments, the DAR Council prepared draft revisions to the rule. On February 19, 1988, the DAR Council published a second interim rule. See 53 Fed. Reg. 5,114 (1988). This rule became effective on March 21, and carries a 30-day comment period. Among other changes, the February 19 rule provides that SDB set-asides will not be conducted when a product or service has been previously acquired successfully by the contracting office on the basis of a small business set-aside under Federal Acquisition Regulation (FAR) § 19.501(g). 53 Fed. Reg. 5,123.

DAKF10-88-B-0015, issued by the Army.

Logistical objects to the inclusion of the subject solicitations within the initial SDB set-aside rule. While the protester concedes that the initial rule was in effect when the solicitations were issued, it argues that the program is being implemented through the initial rule in a manner that is in violation of the Authorization Act which established the program in that DOD allegedly is concentrating the SDB set asides in standard industrial classification industry group number 5812, relating primarily to the retail sale of food and drinks for on-premise or immediate consumption. Logistical, a nondisadvantaged small business in this industry, contends that it was not the intention of Congress in establishing the SDB program for it to be so concentrated in one industry in order to meet DOD's goal for SDB participation of five percent of the dollar value of total DOD contracts awarded for fiscal years 1987, 1988, and 1989. Logistical suggests that the goal of five percent SDB participation is to be applied individually to each standard industrial classification group for all contracts awarded by DOD.

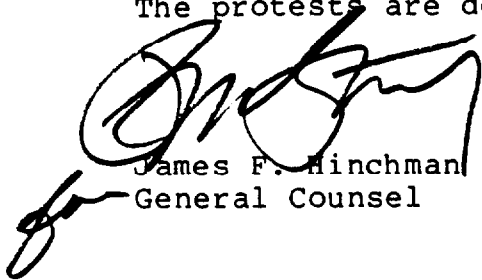
We find the protester's arguments to be without merit. In a recent case, Techplan Corp., American Maintenance Co., B-228396.3, B-229608, March 28, 1988, 88-1 CPD ¶ , we ruled that the SDB set-aside program as contained in the initial May 4 interim rule was, at the time it was issued, a legally permissible implementation of the 1987 Authorization Act requirements. We noted in Techplan that it was left to the Secretary of Defense to "exercise his utmost authority, resourcefulness and diligence" to develop a program that would meet the rather difficult-to-reconcile goals of increasing SDB participation while also presumably increasing overall small business participation. We also found nothing in the Authorization Act that required DOD to maintain particular requirements as set-asides for nondisadvantaged small businesses in attempting to meet the five percent goal of SDB participation. Logistical's argument that Congress intended to have the five percent goal be applied to each industry group is, thus, unsupported.

Logistical argues further in its comments on the agency reports that the second interim rule, which amended the first interim rule to provide, among other changes, for an exclusion from the SDB program for procurements which have been previously set-aside for small businesses, should now apply to these procurements and require that they be amended or canceled and the requirements resolicited to allow competition by all small businesses.

We disagree. The February 19 Federal Register notice for the second interim rule indicates that the new rule was to be effective on March 21. We ruled in Techplan that the

reasonable interpretation of the rule was that it applied only to solicitations issued on or after March 21. Since the solicitations at issue here were issued after June 1, 1987 but before March 21, 1988, they are covered by the first interim rule, which does not contain an exclusion for procurements which have been previously set aside for small businesses and which we have found to have been a legally permissible implementation of the 1987 Defense Authorization Act requirements.

The protests are denied.

A handwritten signature in black ink, appearing to read "J. Hinchman", is written over the typed name and title. The signature is stylized with a large loop at the beginning and a long horizontal stroke at the end.

James F. Hinchman
General Counsel